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IN THE

Supreme Court of the United States

October Term—1952

No. 329

FRANK COSTELLO,

Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITIONER'S REPLY BRIEF

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Concerning Point I of Petitioner's Main Brief

(b) The Government (at p. 14 of its brief) concedes *arguendo* that the trial court's instructions on the first three counts were tantamount to a directed verdict of guilt, but contends that "the simple and directive character of the instructions" reduced the likelihood of prejudice. But the Government loses sight of the fact that the very simplicity and directness of the instructions only aggravated the effect of the error, for the impact on the minds of the jurors was driven with surer and more forceful blows.

The Government misapprehends petitioner's position when it wrongfully assumes it to be that every partial re-

versal necessitates complete reversal. That is not our claim. The crucial question in each case is whether a defendant's right to a fair trial has been impaired and whether prejudice is fairly inferable. Unless the Government can establish with reasonable certainty that defendant was not prejudiced, the error is not to be overlooked. The Government cites (pp. 14-15) two cases on the point, and we believe that both of them fortify our argument.

In the first of these, *Miranda* v. *United States* (C.A. 9, 1952), 196 F. 2d 480, petition for certiorari pending No. 40 Misc., O.T. 1952, a prosecution for making false statements under oath, defendant was acquitted on certain counts and convicted on one. His principal contention on appeal was that he was prejudiced by the evidence on the counts as to which he was acquitted. In affirming the conviction, the Court held that defendant conceded the admissibility of the evidence relating to the counts on which he was acquitted "for the limited purpose of tending to show appellant's knowledge and intent in committing the acts alleged in count eight;" that the jury was accurately and fully instructed as to this limited purpose; and that *the very acquittal on the other counts persuasively demonstrated the lack of prejudice.* All of these factors are, of course, lacking herein.

In the other case cited, *Marzani* v. *United States* (C.A. D.C. 1948) 168 F. 2d 133, 138, the trial court had erroneously permitted certain counts to go to the jury that were barred by limitations. The charges were the making of false statements in a matter within the jurisdiction of a governmental agency (18 U.S.C.A. Sec. 80). In rejecting defendant's claim of resultant prejudice from the inclusion of the barred counts, the Court of Appeals decided (1) that no evidence was improperly admitted by reason of the

barred counts; and (2) the alleged false statements in the barred counts were the same as, or similar to, the statements involved in the counts properly on trial. *Neither of these distinguishing features is present in the case at bar.* On the contrary: (1) evidence under the reversed counts was received—and over strenuous objections (R. 159-160); and (2) the charges on the reversed counts were for contempts arising from different facts than those involved in the affirmed counts. As the Government indicates, the holding in the *Marzani* case was affirmed by the Supreme Court by a four-to-four vote (335 U. S. 895).

The tenor of both opinions strongly suggests that if the errors assigned had been predicated upon a situation as is here presented, the outcome would have been different.

The argument (p. 15) that the objection was "essentially one of improper joinder of offenses", is altogether without merit. From the standpoint of proper criminal pleading, there can be no question but that counts 1, 3 and 4 were properly joined with the other counts. However, the objection is not one relating to pleading, but instead involves solely the erroneous admission of prejudicial evidence upon trial.

Concerning Point III

(a) The Government takes the position (pp. 17-18) that because defendant's counsel maintained the absence of any issue of fact, there was a waiver of any claim of error predicated upon the improper exclusion of evidence.

We are aware of no rule of law that a defendant who insists—however strongly—that the facts fail to constitute a crime, is thereby foreclosed from assigning errors arising during the trial—even though such errors relate to rulings

bearing upon the admissibility of evidence. The attitude of trial counsel as to whether or not the case presented factual issues is of no moment on the question of reversible error on the exclusion of such evidence. It was counsel's right and duty to press his legal contentions with all possible vigor; and by so doing he can not be charged with waiver of other available error. It may be pertinent to observe that the Court of Appeals in large measure has vindicated the correctness of counsel's position by reversing seven of the ten counts on the same grounds which were persistently urged by him below.

Even if counsel erred in arguing that the three remaining counts presented no factual issues for the jury, does it follow that the defendant in consequence may be denied a fair trial of those counts and that he has forfeited all recourse to appeal? Surely that is not the effect of *Carruthers* v. *Reed* (C.C.A. 8, 1939) 102 F. 2d 933, cited by the Government (p. 18) as "*an analogous situation.*" In that case the attorney for defendants who were negroes charged in Arkansas with rape, after deliberate consideration determined not to challenge the jury by motion to quash because of the exclusion of negroes from both grand and petit juries; and it was there held that the point was not subsequently available on federal habeas corpus, especially since under the law of Arkansas a challenge to the panel was necessary before the jury was sworn.

The Government also refers (p. 18) to *United States* v. *Rosenberg* (C.A. 2) 195 F. 2d 583, 586, ftn. 9, to support its claim of waiver. That case holds that a defendant's failure to object to the reception of hearsay evidence, except in egregious cases, bars reliance thereon as error—a situation in no manner comparable to the instant case,

which involves the exclusion of pertinent and material evidence offered by the defendant.

Nor is it entirely accurate for the Government to say (p. 18) that "counsel declined to submit any requests to charge," for at the conclusion of the instructions there was some colloquy in the course of which (R. 296-300) counsel made various specific requests on the issues which the jury was to consider.

CONCLUSION

For the reasons stated in the petition and the arguments set forth in the main brief, the application for a writ of certiorari should be granted.

Dated: New York, N. Y., October 15, 1952.

Respectfully submitted,

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